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## **Expungement of Criminal Records**

This information brief describes Minnesota laws and appellate court decisions governing the expungement (i.e., the sealing, destruction, or return to the subject) of criminal records maintained by government agencies on individuals. Part 1 discusses the scope of expungement remedies under the relevant Minnesota Statutes and describes the procedure for obtaining a court expungement order or other legal relief under those laws. Part 2 discusses the judiciary's inherent power to expunge criminal records, a power that is separate from and independent of the statutory expungement process. All references to Minnesota Statutes incorporate amendments through the 2001 First Special Session.

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## **Expungement of criminal records under Minnesota Statutes**

### **What is expungement?**

Expungement of a record means to seal or destroy it, or return it to the subject of the record.

### **Which laws govern the expungement of records?**

Two separate laws address the issue of expunging criminal records or otherwise removing them from the criminal justice information system. The first law, [Minnesota Statutes, section 299C.11](#), governs arrest records that are maintained by law enforcement agencies. The second law, [Minnesota Statutes, chapter 609A](#), applies to all criminal records maintained by agencies within the criminal justice system. As explained below, the remedy available under these two laws differs significantly.

### **What can an individual who is not a criminal do about the arrest record?**

[Minnesota Statutes, section 299C.11](#), permits the subject of an arrest record to request that it be returned to him or her if:

- the person was not convicted of a felony or gross misdemeanor in the ten years preceding the arrest;
- all pending criminal proceedings related to the arrest were determined in favor of the arrested person; and either
  - the charges were dismissed before a probable cause determination<sup>1</sup> was made in the case; or
  - the prosecutor declined to file charges and no grand jury indictment was returned in the case.

If these circumstances exist, the law allows the petitioner to seek return of records directly from the custodial agency or ask a court to order the records returned as part of an order in an expungement proceeding under [chapter 609A](#).

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<sup>1</sup> *State v. Bragg*, 577 N.W.2d 516 (Minn. App. 1998) interpreted “probable cause determination” to mean a determination, based on the full record, of whether sufficient probable cause exists to proceed to trial.

The statute also states that the phrase “determination of all pending criminal ... proceedings in favor of the arrested person” does not include certain outcomes falling short of a criminal conviction. Specifically, the phrase does not include the following:

- the sealing of a record under the expungement law;
- the arrested person’s successful completion of a diversion program;
- discharge from sentence and restoration of civil rights under [Minnesota Statutes, section 609.165](#); or
- the granting of a pardon.<sup>2</sup>

### **What other statutory remedy is available to the subject of criminal records?**

According to [Minnesota Statutes, chapter 609A](#), the subject of any type of criminal record may seek a court order expunging those records. In fact, a person who is ineligible to seek the return of arrest records under [Minnesota Statutes, section 299C.11](#), may nevertheless seek their expungement under [chapter 609A](#). Under this law, “expungement” means only that the records are sealed and that the agency maintaining the record may not disclose its existence or open it unless otherwise authorized by a court order or statutory authority. [Minnesota Statutes, section 609A.01](#), specifically states that “[n]othing in this chapter authorizes the destruction of records or their return to the subject of the records.”

### **Who is eligible for the expungement remedy?**

Only certain individuals are eligible to petition for an expungement order under chapter 609A.

- **Certain controlled substance offenders.** A person who was convicted of unlawful possession of a controlled substance is eligible to petition for expungement if the court stayed adjudication of the person’s guilt under [Minnesota Statutes, section 152.18](#), and subsequently dismissed the charges in that case following the person’s successful completion of probation.
- **Juveniles prosecuted as adults.** A person who was certified to stand trial as an adult under the juvenile code, convicted of the crime, and committed to the custody of the

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<sup>2</sup> The Minnesota Supreme Court has ruled that the phrase does not include the dismissal of charges following a guilty plea or admission of guilt. *City of St. Paul v. Froyland*, 310 Minn. 268, 246 N.W.2d 435 (1976). See also *State v. L.K.*, 359 N.W.2d 305 (Minn. App. 1984). The Court of Appeals has interpreted the phrase as well. *State v. Davisson*, 624 N.W.2d 292 (Minn. App. 2001) review denied 2001 (stay of adjudication is not a resolution in the petitioner’s favor).

Commissioner of Corrections is eligible to petition for expungement if the person was finally discharged by the commissioner or was placed on probation and successfully completed its conditions.

- **Criminal proceedings in which proceedings were resolved in favor of petitioner.** A person who was prosecuted for a crime is eligible to petition for expungement if all pending actions or proceedings were resolved in favor of the petitioner. The phrase “resolved in favor of the petitioner” has a somewhat broader meaning than the similar phrase used in the arrest records law. For example, the person need not also show that charges were dismissed before a probable cause determination or were declined by the prosecutor or grand jury. Additionally, the expungement remedy is available to a person who has completed a diversion program if the person did not plead guilty or admit guilt prior to the program and if charges were dismissed following completion of the program.<sup>3</sup> For a brief period, the law treated a finding of not guilty by reason of mental illness as a disposition in favor of the petitioner.<sup>4</sup>

It is clear that the statutory grounds for seeking expungement and, thereby, the sealing of criminal records are more liberal than the grounds for seeking the actual return of arrest records. The rationale for this difference is that the expungement remedy does not result in the permanent loss or destruction of criminal history information and, therefore, can be applied more broadly without harming future criminal investigations.

### **Are any individuals barred from seeking expungement?**

According to [Minnesota Statutes, section 609A.02, subdivision 4](#), conviction records relating to an offense for which registration under the predatory offender registration act is required may not be expunged. These offenses include murder while committing forcible criminal sexual conduct, kidnapping, felony-level criminal sexual conduct, and a variety of other sex-related offenses.<sup>5</sup>

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<sup>3</sup> *State v. Horner*, 617 N.W.2d 789 (Minn. App. 2000).

<sup>4</sup> The Minnesota Court of Appeals ruled that a not guilty by reason of mental illness (NGMI) finding was a “resolution in favor of the petitioner” within the meaning of the expungement statute. *State v. Ambaye*, 596 N.W.2d 668 (Minn. App. 1999). In response to this ruling, the legislature amended the statutes in 2000 to give the public agency a lesser of burden of proof to meet in resisting expungement petitions in NGMI cases. Following the legislature’s adjournment, however, the Minnesota Supreme Court reversed the appellate court’s ruling and held that NGMI verdicts do not fall within the meaning of the phrase “resolution in favor of the petitioner.” Therefore, such individuals are ineligible to petition for the expungement of records relating to the case. *State v. Ambaye*, 616 N.W.2d 256 (Minn. 2000). To be consistent with the supreme court decision, the legislature amended [chapter 609A](#) to state expressly that a NGMI finding is not a resolution in favor of the petitioner. [Laws 2001, ch. 209, sec. 1](#).

<sup>5</sup> The registration law also covers other crimes against the person when committed by someone who has a prior record of a sex offense.

## **What are the elements of the statutory expungement process?**

**Expungement petition.** The statutory expungement process is initiated by filing a petition with the district court.<sup>6</sup> The petition must state, among other things:

- why expungement is sought (e.g., for employment or licensure purposes), the statutory or other legal authority under which it is sought, and why it should be granted;
- the details of the offense or arrest for which expungement is sought, including information about any victim and current or prior order for protection;
- in the case of a conviction, what steps the petitioner has taken toward personal rehabilitation;
- the petitioner's criminal conviction record in this state and in other states, regardless of whether the conviction occurred before or after the arrest or offense for which expungement is sought;
- the petitioner's criminal charges record in all prior and pending cases, including charges which have been continued for dismissal, stayed for adjudication, or were the subject of diversion; and
- all prior requests made by the petitioner for a pardon, return of arrest records, or expungement for this or any other offense, whether granted or not, and all stays of adjudication or imposition of sentence involving the petitioner.

**Notice and hearing.** The petition and proposed expungement order must be served by mail on the prosecutorial office that had jurisdiction over the offense sought to be expunged and on all other state and local government agencies and jurisdictions whose records would be affected by an expungement order, as well as on the attorney who serves each agency or jurisdiction. The prosecutorial office with jurisdiction over the offense must mail the petition and proposed order to any victims who have requested notice under [Minnesota Statutes, section 611A.06, subdivision 1a](#). The notice must inform the victim of the right to be present and to submit an oral or written statement at the expungement hearing.<sup>7</sup> It may be sent to the most recent written address the victim provided to the prosecutorial authority.

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<sup>6</sup> [Minn. Stat. § 609A.03, subd. 2.](#)

<sup>7</sup> [Minn. Stat. § 609A.03, subd. 3.](#)

The hearing must be held not sooner than 60 days after service of the petition. If a victim submits a statement describing the harm she or he suffered and recommending whether to grant or deny expungement, the court must consider the victim's statement when making its decision.<sup>8</sup>

**Expungement order; burden of proof.** [Minnesota Statutes, section 609A.03, subdivision 5](#), specifically states that expungement is an extraordinary remedy. The law provides that it is to be granted only upon proof, by clear and convincing evidence, that expungement would yield a benefit to the petitioner commensurate with the disadvantages to the public of sealing the record and burdening the court and public agencies with the responsibility of issuing, enforcing, and monitoring the expungement order.

The law makes a distinction, however, between the expungement of convictions and the expungement of records in which proceedings were resolved in favor of the petitioner. To obtain expungement of a controlled substance conviction or a conviction in a certified juvenile matter (see page 3), the petitioner bears the burden of proving that the benefits to the petitioner outweigh the disadvantages to the public. In contrast, when the proceedings were resolved in favor of the petitioner, the public agency bears the burden of proof concerning expungement. In cases in which the government bears the burden of proof, the court is directed to issue the expungement order unless the agency or jurisdiction whose records are affected establishes, by clear and convincing evidence, that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record.

**Expungement of certain conviction records.** If the order expunges a conviction for a crime of violence, it must specify that the petitioner continues to be prohibited from possessing or otherwise dealing in firearms until ten years have elapsed since the sentence was discharged or the person was restored to civil rights.<sup>9</sup>

However, the statute states that the effect of an order expunging a controlled substance conviction is to restore the person to the legal status the person occupied before the person was arrested or charged. This means that the person will not be guilty of perjury or giving a false statement for failing to acknowledge the fact of the arrest or conviction.<sup>10</sup>

**Appeal of expungement order.** [Minnesota Statutes, section 609A.03, subdivision 8](#), provides that an expungement order is automatically stayed for 60 days after it is filed to permit the

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<sup>8</sup> [Minn. Stat. § 609A.03, subd. 4.](#)

<sup>9</sup> [Minn. Stat. § 609A.03, subd. 5\(d\).](#) This firearms disability arises under [Minnesota Statutes, section 624.713.](#)

<sup>10</sup> [Minn. Stat. § 609A.03, subd. 6.](#)

agency or jurisdiction whose records are affected to appeal the order. If appealed, the order is stayed pending appeal.

**Limitations of expungement orders.** Chapter 609A places two limits on the scope and effect of expungement orders. First, if the criminal proceedings to which the order relates were supported by a probable cause determination, the law prohibits the sealing, return, or destruction of DNA samples and DNA records held by the Bureau of Criminal Apprehension. Second, the law authorizes expunged records to be opened under either of the following circumstances:

- any criminal record may be opened upon a court's *ex parte* order for purposes of a subsequent criminal investigation, prosecution, or sentencing; and
- a criminal conviction record may be opened without a court order in order to evaluate a prospective employee of a criminal justice agency.

The agency maintaining the expunged records must inform a law enforcement, prosecution, or correctional agency, on request, that a sealed record on an individual exists and that the agency has a right to obtain access to it.

## **Expungement of criminal records under the court's inherent judicial power**

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Records that are ineligible for expungement under [Minnesota Statutes, chapter 609A](#), may, nevertheless, be eligible for expungement under the court's inherent authority to "grant relief when necessary to the performance of its unique judicial functions."<sup>11</sup>

The existence of the court's inherent judicial authority to expunge criminal records predates the existence of the statutory expungement law.<sup>12</sup> This inherent authority is based on the constitutional separation of powers doctrine and affects only "that which is essential to the existence, dignity, and function of a court because it is a court."<sup>13</sup> The courts have ruled that the judicial power to expunge records is to be exercised sparingly and with due respect for the unique constitutional functions of other branches of government whose records may be affected by the order.<sup>14</sup> As the Minnesota Court of Appeals stated, courts

must tailor the exercise of their inherent powers to accommodate legislative mandates regarding access to governmental records and to avoid encroaching on executive functions.<sup>15</sup>

Under this inherent power, a court has the authority to issue expungement orders concerning criminal records in two different situations:

- in cases where the petitioner's constitutional rights may be seriously infringed by retention of the records;<sup>16</sup> and
- in cases where expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing, and monitoring an expungement order.<sup>17</sup>

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<sup>11</sup> *State v. T.M.B.*, 590 N.W.2d 809, 811 (Minn. App. 1999).

<sup>12</sup> *See e.g., State v. C.A.*, 304 N.W.2d 353 (Minn. 1981).

<sup>13</sup> *In re Clerk of Lyon County Courts' Compensation*, 308 Minn. 172, 176, 241 N.W.2d 781, 784 (1976).

<sup>14</sup> *State v. Ambaye*, 616 N.W.2d 256 (Minn. 2000).

<sup>15</sup> *State v. T.M.B.*, note 11, *supra*, at 811.

<sup>16</sup> *In re R.L.F.*, 256 N.W.2d 803, 807-8 (Minn. 1977).

<sup>17</sup> *State v. C.A.*, note 12, *supra*, at 358. The balancing test used under the statutory expungement process is modeled on this judicial test.



When the court's inherent expungement power is based on a violation of the petitioner's constitutional rights or the abuse of discretion by a criminal justice agency, the expungement order may cover records maintained either by a court or by an executive branch agency, such as a law enforcement agency. The court's intrusion on the functions of a separate branch of government is warranted in these cases because of the judiciary's fundamental function of protecting an individual's constitutional rights.<sup>18</sup>

However, when the court's inherent expungement power is based on a balancing of the advantages to the petitioner against the disadvantages to the public, the expungement order may only affect records created and maintained by the judiciary. It may not affect records maintained by either of the other two branches of government, nor may it affect records created by executive branch agencies that are used during a judicial proceeding. This limitation recognizes that such a judicial intrusion into the essential functions of the other branches of government would violate the constitutional separation of powers doctrine.<sup>19</sup>

If a court exercises its inherent authority to expunge a criminal record, its remedy potentially is broader than the statutory expungement remedy. The case law prior to and after the enactment of [chapter 609A](#) is clear that "expungement means to erase all evidence of the event as if it never occurred."<sup>20</sup> This "erasure" may be accomplished, at the option of the court, by sealing the record, deleting it, obliterating the subject's name from it, or returning it to the subject of the record. Once the expungement has occurred, the person benefitting from the order may, thereafter, swear truthfully that the expunged criminal record does not exist.

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<sup>18</sup> *State v. T.M.B.*, note 11, *supra*, at 812.

<sup>19</sup> *Id.* See also *In re Quinn*, 517 N.W.2d 895, 900 (Minn. 1994). But see *State v. Manning*, 1996 Minn. App. Lexis 792.

<sup>20</sup> *State v. M.B.M.*, 518 N.W.2d 880, 882 (Minn. App. 1994) (citation and internal quotation omitted). See also "Case Comment, Criminal Procedure: Expungement of Arrest Records," 62 Minn. L. Rev. 229, fn. 6 (1978).